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Wohrle v. Kootenai County Respondent's Brief Dckt. 34095

COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES WOHRLE and PENNY WOHRLE, husband and wife,

Petitioners/Respondents

vs.

KOOTENAI COUNTY, a political subdivision of the State of Idaho,

Respondent/Appellant

DOCKET NO. 34095

Kootenai County Case No. CV 06-5323

RESPONDENTS' BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho in and for the County of Kootenai, Honorable John T. Mitchell, District Judge presiding

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I. STATEMENT OF THE CASE

James and Penny Wohrle (WOHRLE) own a parcel of waterfront property on Lake Coeur d'Alene. The 1.4 acre parcel has 100 feet of frontage on the lake that can only be accessed via the water. The entire property is on a steep hillside with rocky cliffs at the water's edge.

Because of the steep topography of the property, WOHRLE constructed two small decks at the shoreline. One deck was built on a concrete reinforced area of the hillside, above the high water line, and the other deck was constructed on three concrete pilings placed below the high water line. Both decks were built to provide a flat area for recreational use of the land. [1]

Before building the decks, WOHRLE inquired with the Idaho Department of Lands to determine if any permits were necessary.[2] The Department of Lands informed WOHRLE that no building permits were required for the proposed decks. [Tr. p. 4, L. 3-8; p. 25, L. 1-12];

In June of 2005, the Army Corps of Engineers sent a letter to WOHRLE regarding the concrete pilings placed below the high water line. [A.R. p. 140] A copy of this letter was sent to Kootenai County. In response, Kootenai County issued a code violation notice for the construction of the decks without building permits. To address the code violation, WOHRLE applied to Kootenai County for a variance to allow the decks to remain in their constructed location. [A.R. p. 112-114] A variance was necessary because the County Zoning Ordinance required any improvements to be set back 25 feet from the water's edge.

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[1] Color photographs showing the decks under construction and the topography of the property can be found in the Agency Record at pages 35-39.

[2] WOHRLE had previously obtained a permit from the Department of Lands for a boat dock on the property. [A.R. p. 62]

The WOHRLE variance application was heard by Kootenai County Hearing Examiner Gary Young in March of 2006. [Tr. p. 1-15] At the hearing, Carl Washburn of the Idaho Department of Lands testified that a permit had been issued by the Department for the WOHRLE boat dock, and that the Department would accept and process an application by WOHRLE for any portion of their decks encroaching over the lake. [Tr. p. 12, L. 22-24; p. 13, L. 14-16] Prior to the hearing, the Army Corps sent a second letter to WOHRLE stating that the Corps had decided to take no action against WOHRLE because the concrete pilings were not causing any discernable adverse effects on the aquatic environment. [Tr. p. 128-129; A.R. p. 128-129]

In addition to the testimony of WOHRLE and Carl Washburn, the Hearing Examiner received four written comments in support of the variance request and two neutral comments. There was no public opposition to the WOHRLE variance request. [A.R. p. 150-156]

The Hearing Examiner issued written findings and conclusions, and recommended to the Board of County Commissioners that the variance request be denied. In his report the Hearing Examiner determined that an undue hardship would result from the literal enforcement of the 25 foot setback requirement due to the steep topography of the property. However, the Hearing Examiner concluded that the requested variance failed "to meet the requirement of public interest and the intent of the zoning ordinance, specifically Section 30.03d." [A.R. p. 162]

WOHRLE requested a second public hearing before the Board of County Commissioners and the Board granted that request. [Tr. p. 16-19] Prior to the Board hearing, WOHRLE resolved all outstanding issues with the Idaho Department of Lands and received an official "notice of compliance" from the Department on May 30, 2006. [A.R. p. 125]

The Board of County Commissioners conducted its hearing on June 1, 2006. At the hearing Mr. Wohrle presented a copy of the May 30, 2006 compliance letter from the Idaho Department of Lands. Mr. Wohrle also testified that a large portion of one deck had been removed to comply with Department of Lands' requirements, and that the Army Corps of Engineers had inspected the property and had "signed us off." [Board Tr. p. 9, L. 7-21] [3]

Prior to the hearing, the Board of Commissioners received 8 written comments in support of the variance request and 2 neutral comments. There was no written comment or public testimony in opposition to the variance application. [Board Tr. p. 8, L. 19-22]

It is important to note that on June 1, 2006, the Board of Commissioners heard the WOHRLE variance request, a similar variance request by Jerry Judd, and a third variance request by Ted Baycroft. The public hearings on these variance requests were conducted in succession and then the Board deliberated on all three applications together. [Board Tr. p. 7, L. 18-22] After closing the last public hearing on the Baycroft variance, Commissioner Gus Johnson introduced a new issue with the following comment to the other commissioners:

> Before we begin deliberations, something that has come up over this testimony on all three of them that is the same, is, the buildable versus non-buildable on the description of the lot. And something that I would like to check on before we make that decisions, that we may have to take this deliberations to another week, is something I want to check on is at, through the Assessor's Office, I would like to see the assessment on these... on whether or not these lots are assessed as buildable or non-buildable lot. That brings up an issue here that was brought up on all three of these as to whether they were buildable or not. Especially when (inaudible) that there is power down to one of

[3] "Board Tr." refers to the combined transcript of the County Commissioners' hearings and deliberations for all three variance requests on June 1, 2006.

> those that they could share. Is that something that you guys would entertain or not?

[Board Tr. p. 35, lines 17-24; p. 36, L. 1-7]

Although the 2005 Assessor's records for the WOHRLE parcel were already part of the record from the Hearing Examiner's hearing, the Commissioners sent a staff person to the Assessor's office to find out if the property was assessed as "buildable" or "non-buildable." [Board Tr. p. 37, L.1-11]

During deliberations, Commissioner Brodie asked all three applicants whether they knew if their property was assessed as "buildable" or "non-buildable." [Board Tr. p. 37, L. 12] Ted Baycroft responded and, at the suggestion of the county attorney, the Baycroft public hearing was reopened to allow Mr. Baycroft to testify. [Board Tr. p. 37, L. 19-25] After a brief comment by Mr. Baycroft, Commissioner Johnson interrupted and Commissioner Currie made a motion to again close the Baycroft hearing. The motion was approved without discussion and without allowing WOHRLE or Jerry Judd any opportunity to respond to Commissioner Brodie's question whether their property was "buildable" or "non-buildable." [Board Tr. p. 38, L. 8-25; p. 39, L. 1-7]

After a brief recess, the following comments were made during deliberations by Commissioner Johnson:

> We are back from a recess. Uh, Debbie Wilson went downstairs to the Assessor's Office and received the Assessor's, uh, Valuation Sheet and coding of the land type of these types of properties for James Wohrle, Jerry Judd, and Theodore Baycroft.

[Board Tr. p. 40, L. 2-6]

> Um, under Mr. Wohrle, on all three of them, I can go, I will lump them all three together. On the land type, uh, under one classification, waterfront vacant, non-buildable. And then they have remaining acreage of the, of the one acre is non-buildable, the remaining acreage is a .62. On Mr. Judd's, wait a minute, I just read Mr. Judds, .62. On Mr. Baycroft's, he has a .688 of remaining acreage at number two, waterfront vacant, non-buildable, of the one acre. And on Mr. Wohrle's, it is remaining acreage of the .688 and one acre of waterfront vacant non-buildable. On all three classifications, on all three pieces of property. The reason I asked for that, because when you, when those lots were purchased. And we all, we've lived here long enough to know those lots were waterfront, yes, but at a non-buildable rate, taxable, that meant they were less, the value of the property was also less than what you would normally find around the rest of the lake on a buildable lot.

[Board Tr. p. 41, L. 1-17]

At this point, County attorney Pat Braden suggested that the Commissioners should allow each applicant to view the new information from the Assessor's office and offer rebuttal. The Commissioners then reopened the WOHRLE public hearing again and Commissioner Johnson had the following exchange with Mr. Wohrle:

> Chairman Johnson: This is what we received from the Assessor's Office on your property and we want to allow any comments you'd like to add.
>
> James Wohrle: Non-buildable, does that mean any structure, such as a deck, or does that just mean house, or living structure?
>
> Chairman Johnson: What it means is non-buildable, it is all before a, you're taxed at a non-buildable rate, knowing that the property would not, uh, qualify to build a home. It doesn't mean, not the deck, but, what I am trying to, my reason for asking for this, again, was so that it, it would clarify, because it has been talked about buildable and non-buildable, that's why you have to do the decks, and, and that's all I was trying to get at is a, uh, when you purchased the property. And, again, it is a buyer-beware state. When you purchased the property, so you purchased a piece of property that was at a value that would be much less, knowing that it was a dock lot. That's, that's,

that's the purpose of me trying to find this. History provides us with the properties on that lake, on that side of the lake, they are non-accessible. Everybody knew it for years and years and years. When folks were buying them for a dock lot. They knew they could put a dock in, tie their boat up, and still have, be on the water. That is why the values are a lot less. And when I look at these, uh, decks that are being put on now and protruding over the water and what not, some are on their own property, but they are building these, these things, I'm not sure if that was the purpose, intent of those lots to be built on in that manner. They were going to be, again, be called dock lots. And that was the only purpose, I was trying to find out where we were at on this cause it was talked about buildable and non-buildable.

James Wohrle: Well, we never, never entertained the, the fact of building a home there, we were just doing the dock, the deck for convenience sake. Like Ted says, we have a place to actually put, if you looked at all, you know, all of the properties where people have purchased them, they actually have been digging out the hillside, making flat areas and it seems to be access, acceptable. Uh, perhaps because nobody has been sited for it and, uh, we just did the decks just to, uh, uh, keep the dirt level down and (inaudible) down and things like that. I know that ones over the water, which we did take out was, uh, way beyond what we should have done. I realize that. That is why we took it out. Probably take the concrete out, um, probably later on this fall when the water level is down. Because we've done, we built everything in the off-season, in the fall and winter, so we didn't, didn't hurt the water quality and things like that.

Chairman Johnson: Okay. Thank you.

James Wohrle: Thank you.

Commissioner Currie: Move the public hearing closed on V-841-05 and move to deliberations after the other two.

Chairman Johnson: Great.

[Board Tr. p. 42, L. 14 through p. 44, L. 15]

Commissioner Currie's motion was unanimously approved and the WOHRLE public hearing was again closed without any further comment from Mr. Wohrle, and without any

opportunity to comment given to Mrs. Wohrle, Mr. Judd, Mr. Baycroft or any of the other persons in attendance. [Board Tr. p. 44, L. 13-22]

At this point, the hearing for Jerry Judd's variance was reopened for public testimony. [Board Tr. p. 44, L. 23-25; p. 45, L. 1-6] What followed was a discussion between Jerry Judd and the Commissioners concerning the assessed and market value of his parcel as a "buildable" lot. This discussion ended abruptly with a motion by Commissioner Currie to close public testimony and move to the next case (Baycroft). [Board Tr. p. 45, L. 7 through p. 47, L. 6] While the Judd variance hearing was reopened, none of the other applicants were given the opportunity to speak or rebut any of the additional testimony given or received by the Commissioners.

Finally, the Board reopened the Baycroft variance hearing and Mr. Baycroft asked a relevant question:

> Theodore Baycroft: Okay, my question, my, to state it further, I mean, I went to the Assessor's Office and they gave, they said it was a neutral position, it hadn't been determined. Obviously, this information is here. My question is, when did they determine it was buildable or unbuildable. Because when I went, they didn't have a determination. And was that determination after, after they reassessed our property? Because, when I originally bought the property, they didn't have a determination.

[Board Tr. p. 47, L. 23 through p. 48, L. 7]

Mr. Baycroft and Commissioner Johnson then engaged in a lengthy debate over the meaning of the County Assessor records with Commissioner Johnson offering new information, new testimony and his own legal conclusions. [Board Tr. pp. 48-51] During this dialog, a woman in the audience tried to disagree with Commissioner Johnson's comments, but she was

not allowed to speak. [Board Tr. p. 49, L. 23-25] Again, without allowing any other person to testify or rebut this new information, the Board closed the public hearing on the Baycroft variance and went directly to simultaneous deliberations on all three variance cases. [Board Tr. p. 52, L. 15-25]

The sum total of deliberations by the County Commissioners on all three cases consists of the following comments:

> Commissioner Brodie: It's ugly. I mean, the bottom line is, I, I feel very, very sorry for each and every one of you for being allowed to believe, number one, it was a buildable lot, that you could do something other than enjoy a dock lot, which is, I think exactly what you have. Regardless of that, the requirement is, you build within setbacks and you get a permit first.
>
> Commissioner Currie: I'm going to take it a step further. I sit on the, on a Basin Commission, uh, and there are representatives from Washington State. Uh, and this tells me that Washington State's rules are tougher than what ours are. Uh, so, uh, I, I would think that you would have, uh, looked into the legal setbacks, especially, I have to complement you, you guys did a great job in the building process. I, I come from the building industry and, uh, uh, you did a good job. But, you didn't, didn't do your homework. Uh, and, uh, rules changed. Uh, uh, I, I used, I used, my family used to have a place on (inaudible) couple of years ago. And what we could have done back in the sixties is different than what we could do today. Uh, and, I think you should have done your, home, uh, your due home, uh, due diligence and your homework and your process. So, uh, at, Gus, do you have anything else to...
>
> Chairman Johnson: I don't. It's been said.

[Board Tr. p. 53, L. 7 through p. 54, L. 4]

Without further deliberation, the Commissioners unanimously voted to sustain the Hearing Examiner's recommendation to deny the WOHRLE variance and ordered WOHRLE to

remove the decks within 60 days. [Board Tr. p. 54, L. 5-23] Two weeks later, the Board issued written findings of fact, conclusions of law and an Order of Decision. [A.R. p. 174]

On a petition for judicial review of the Board's written Order, the district court allowed WOHRLE to supplement the record with evidence of a similar variance request by Stephen and Mary Iacoboni. [R. p. 86] The Iacoboni variance was for a staircase built *without* a building permit and in violation of the 5 foot setback for the sides of the parcel. The staircase was built to provide access to the shore of Hayden Lake. [R. p. 11-42] The Iacoboni variance was approved by the Board of Commissioners about three weeks after the WOHRLE variance was denied and against the recommendation of the Hearing Examiner. [R. p. 25-29]

Following briefing and oral argument, the district court held that the evidence supported a finding that WOHRLE would suffer an undue hardship from a literal enforcement of the 25 foot setback requirement. [Dist. Ct. Tr. p. 49, L. 8-9] The district court also found that there was no evidence to support the County's conclusion that the variance was in conflict with the public interest. [Dist. Ct. Tr. p. 49, L. 9-11; p. 50, L. 13-20] Based on these findings, the court concluded that the decision of the County Commissioners was arbitrary and capricious and an abuse of discretion. [Dist. Ct. Tr. p. 50, L. 21 – p. 51, L. 3] The district court remanded the matter back to the Board of Commissioners to determine if the requested variance was "the minimum that will make possible the reasonable use of the land, building or structure," as required under Kootenai County Zoning Ordinance §30.03. [Dist. Ct. Tr. p. 51, L. 4-22; R. p. 141]

WOHRLE sought an award of attorney fees and costs under I.C. §12-117 and the issue was separately briefed by both sides and submitted without oral argument. The district court awarded attorney fees and costs to WOHRLE in a memorandum decision and order. [R. p. 140]

II. ADDITIONAL ISSUES ON APPEAL

6. Whether the decision of the Kootenai County Board of Commissioners was made upon unlawful procedure.

7. Whether the decision of the Kootenai County Board of Commissioners was not supported by substantial evidence in the record.

8. Whether WOHRLE is entitled to attorney fees on appeal under Idaho Code 12-117.

III. ARGUMENT

1. The District Court did not err in allowing the record to be augmented.

Kootenai County makes four arguments in support of its claim that the District Court erred in allowing the record to be augmented with evidence from another variance decision by the Board of Commissioners.

First, the County states that Civil Rule 84(l) governs the district court's ability to augment the record on a petition for judicial review. [Appellant's Brief, p. 7] This statement is incorrect. Rule 84(a)(1) clearly states that the procedures and standards for judicial review of local government actions "shall be as provided by statute." Rule 84 only applies when a statute does not supply the necessary procedure or standard of review. Because Idaho Code §67-5276 supplies both the procedure and standards to determine whether additional evidence should be considered on a petition for judicial review, Civil Rule 84(l) does not apply.

Under I.C. §67-5276 the party seeking to supplement the record must show that the additional evidence is (1) material, (2) relates to the validity of the agency action, and (3) there are good reasons for the failure to present the additional evidence to the agency, or (4) there were alleged irregularities in procedure before the agency.

The second argument made by Kootenai County is that the Iacoboni variance information was not "material" to the district court's review of the WOHRLE variance. As noted above, the Board of Commissioners denied the WOHRLE variance because granting the variance would "legitimize the Applicants' construction of decks without required building permits, which would be considered a special privilege;" [A.R. p. 178, ¶ 5.02] and because the "variance is not necessary to accommodate the recreational use of the property and would be detrimental to surrounding properties and the public welfare if zero setbacks and lake encroachments were to be allowed, even by special permit." [A.R. p. 178, ¶ 5.03]

The record clearly shows that the Commissioners did not want to *reward* WOHRLE by granting the variance request for decks constructed without building permits. For WOHRLE, the Commissioners concluded that it would be contrary to the public interest to do so. Three weeks later, the same Commissioners reached the opposite conclusion on the Iacoboni variance request for a staircase constructed without building permits. The Iacoboni variance information was material to the district court's review because it showed that it is not a "special privilege" to receive a variance for improvements constructed without a building permit, and that building without a permit does not *automatically disqualify* the improvements for a variance. Secondly, the Iacoboni information was material to show that the Commissioners' decision on the

WOHRLE variance was arbitrary and capricious. A contradictory decision made on nearly identical facts is relevant evidence of arbitrary and capricious behavior that "relates to the validity of the agency action." I.C. §67-5276(1)

The third objection offered by Kootenai County is that WOHRLE failed to present the Iacoboni variance information to the Board of Commissioners on June 1, 2007. Of course the reason WOHRLE did not present the Iacoboni information to the Board is because the Iacoboni decision was made three weeks after the WOHRLE hearing.

The County's fourth argument is that the Iacoboni variance information was not evidence of "alleged irregularities in procedure before the agency..." I.C. 67-5276(1)(b) The County interprets §67-5276 as requiring the applicant to show **both** (a) good reason for failing to present the additional evidence **and** (b) alleged procedural irregularities. The plain language and punctuation of the statute do not support this interpretation.[4]

Finally, to the extent it was error for the District Court to receive additional evidence outside of the agency record, such error was harmless as it did not impact the District Court's decision. As this Court stated in *Urrutia v. Blaine County,* 134 Idaho 353, (2000):

> The district judge's error here, however, was harmless. The burden is upon the Board to establish a prejudicial error and error is prejudicial only if it could have affected or did affect the outcome of a proceeding. See *Burgess v. Salmon River Canal Co.,* 119 Idaho 299, 306, 805 P.2d 1223, 1230 (1991). Here, the Board has not shown that its rights were prejudiced as a result of the district judge's decision to include the additional information. The district judge, in his Opinion Re: Petition for Judicial Review, did not mention the Board's prior approval of single-family residential subdivisions in the A-20 zone or the Prairie Sun Ranch Subdivision in the A-20 zone. Instead, the district judge focused on the Board's misapplication of the comprehensive plan and misinterpretation of Bone. The

[4] Nevertheless, WOHRLE argued extensively that the Commissioners' decision was the result of improper procedure and violation of WOHRLE's due process rights.

> additional evidence thus appears to have played no role in the district judge's decision and its admission constituted, at most, harmless error.

Id. at 361.

Here, as in *Urrutia*, the district court did not once mention the Iacoboni information as a basis for his final decision. If it was error for the district court to supplement the agency record with the Iacoboni information, such error was harmless.

2. The District Court did not err in finding the Commissioners' decision to be arbitrary, capricious and an abuse of discretion.

Under the Idaho Administrative Procedures Act, a reviewing court, "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." §67-5279(1) The reviewing court should defer to the agency's findings of fact unless they are clearly erroneous or not supported by substantial, competent evidence in the record. *Fischer v. City of Ketchum,* 141 Idaho 349, 352 (2005). "A variance request, like a rezoning request, focuses upon a specific parcel of property. It invokes a quasi-judicial power. Moreover, a variance request contemplates no modification of the zoning ordinance. It is governed strictly by existing ordinance requirements. Therefore, in reviewing a variance decision, our function is to determine whether the zoning board's findings are supported by substantial evidence and, if so, whether the board's conclusions properly apply the zoning ordinance to the facts as found." *City of Burley v. McCaslin Lumber Co.*, 107 Idaho 906, 909 (Ct. App. 1984).

In this case, an independent review of the agency record should lead to the same conclusion reached by the district court. In their written Order of Decision, the County Commissioners made the following **findings of fact**:

1. The WOHRLE parcel is a steep, north facing slope with a shoreline of mostly rock with some brush and moss, and accessible only by boat. [A.R. p. 175, ¶ 2.03 and 2.07]

2. Most of the parcel is steep and unstable with only the shoreline suitable for building. [A.R. p. 175, ¶ 2.02]

3. There are two decks on the parcel. The smaller deck was built upon a concrete reinforced area of the hillside, above the high water mark, and the larger deck was built into the hillside with three pilings located below the high water mark. [A.R. p. 175, ¶ 2.02]

4. Both decks were built without building permits. [A.R. p. 175, ¶ 2.05]

5. There is no water or sewage services on the parcel. [A.R. p. 175, ¶ 2.09]

6. The surrounding land use consists primarily of vacant lots and float homes. [A.R. p. 175, ¶ 2.06]

7. There was no objection to the requested variance from the East Side Fire District. [A.R. p. 176, ¶ 2.11]

8. The Idaho Department of Lands approved the deck pilings below the ordinary high water mark. [A.R. p. 176, ¶ 2.12]

9. The Army Corps of Engineers determined that the concrete footings supporting the decks were not causing any discernable adverse effects on the aquatic environment and the broken rock placed below the ordinary high water mark is minor and causing little impact to aquatic resources. [A.R. p. 176, ¶ 2.13]

10. There was no public opposition to the variance application. [A.R. p. 176, ¶ 2.16]; and

11. WOHRLE met with County staff on several occasions to address and rectify the County's code violation notice. [A.R. p. 176, ¶ 3.01]

Based on these findings of fact, the Board of Commissioners made **conclusions of law** including that a literal enforcement of the 25 foot setback would result in an "undue hardship" for WOHRLE. [A.R. p. 178, ¶ 5.01] However, the Board denied the variance request because:

1. "The issuance of variances that not only encroach into the required setback but also the lakebed is not in the public interest and would allow a benefit that is not afforded to other property owners fronting Coeur d'Alene Lake." [A.R. p. 178, ¶ 5.01]
2. Granting the requested variance is contrary to Idaho Code §67-6516 because it would "legitimize the Applicants' construction of decks without required building permits, which would be considered a special privilege." [A.R. p. 178, ¶ 5.02]
3. The "variance is not necessary to accommodate the recreational use of the property and would be detrimental to surrounding properties and the public welfare if zero setbacks and lake encroachments were to be allowed, even by special permit." [A.R. p. 178, ¶ 5.03]

The district court determined that these conclusions were not supported by substantial, competent evidence in the record. The district court did not substitute its judgment for that of the County as to the *weight* of the evidence, instead the court determined that there was no evidence to weigh in support of the County's conclusion that the variance would be "in conflict with the public interest." I.C. §65-6516.

There is no evidence in the record to support the Commissioners' first conclusion of law: "The issuance of variances that not only encroach into the required setback but also the lakebed is not in the public interest and would allow a benefit that is not afforded to other property owners fronting Coeur d'Alene Lake." [A.R. p. 178, ¶ 5.01] Every variance, by definition involves "a modification of the bulk and placement requirements of the ordinance as to lot size, lot coverage, width, depth, front yard, side yard, rear yard, setbacks, parking space, height of buildings, or other ordinance provision affecting the size or shape of a structure or the placement of the structure upon lots, or the size of lots." I.C. §67-6516

A variance request can't be denied simply because it seeks a modification of a setback.[5] And yet, the Board of Commissioners concluded that the WOHRLE variance was not in the public interest because it involved an encroachment into the required setback! Obviously there is no evidence in the record to support this ridiculous conclusion by the County. Nor is there any evidence in the record to support the conclusion that an encroachment into the lakebed is in conflict with the public interest. Nonnavigational lakebed encroachments are regulated by the Idaho Department of Lands. Idaho Code §58-1306 sets forth the process for nonnavigational encroachment permits to be requested, evaluated and approved. Clearly, encroachments into the lakebed are not *per se* in conflict with the public interest. Moreover, WOHRLE presented a letter to the Board of Commissioners from the Department of Lands stating that the deck construction "waterward of the ordinary high water mark" was <u>in compliance</u> with DoL requirements. [A.R. p. 125]

[5] That would be like denying a request for a driver's license because the applicant intends to use the license to drive.

The Board of Commissioners did not make any finding of fact that the requested variance was in conflict with the public interest because there was no evidence to support such a finding. Instead, the Board simply concluded that the requested variance would be contrary to the public interest because it involved a variance of the setback distance and a lakebed encroachment. The district court correctly held that this conclusion was not supported by any evidence in the record.

In their second conclusion of law, the Board of Commissioners stated that granting the requested variance would "legitimize the Applicants' construction of decks without required building permits, which would be considered a special privilege." [A.R. p. 178, ¶ 5.02] It is uncontested that WOHRLE built the two decks without building permits. The record also clearly shows that this mistake was not an attempt to cheat the system, but was the result of ignorance and some bad advice. [Tr. p. 4, L. 3-15; Board Tr. p. 10, L. 1-12] Of course, after WOHRLE discovered this error, they sought to correct their mistake. However, the County would not issue a building permit for the decks until and unless a variance for the setback was approved first. WOHRLE was not seeking the variance as a *reward* for building without a permit; WOHRLE applied for the variance as the first necessary step to correct their non-conforming decks.

The WOHRLE decks were not the first structures to be built in Idaho without building permits. Like most jurisdictions in Idaho, Kootenai County has a process for enforcing building permit requirements. Typically a "red tag" or "stop work" notice is posted on the construction site. The builder is required to apply for a permit and typically must pay a penalty fee. If inspection of the work reveals any building code violations or defects, those defects must be corrected before the work can continue. It is not the law in Idaho or Kootenai County that

construction built without a valid permit must automatically be torn down before the builder can apply for the necessary permit. Such a rule would be wasteful, punitive and serve no legitimate purpose. And yet, the Board of Commissioners ordered that WOHRLE had to tear down the decks before they could apply for a variance. The Commissioners' Order of Decision concludes with the following remarks:

"After the code violations have been remedied as ordered above, the Applicants may apply for a building permit and site disturbance permit to allow construction of deck(s) or structure(s) in compliance with the adopted ordinances of Kootenai County. The Applicants may also choose to request a variance of lesser encroachment." [A.R. p. 178]

As the district court noted, the Board of Commissioners were clearly "sidetracked on the fact that the deck was already built." [Dist. Ct. Tr. p. 49, L. 19-20] The Commissioners arbitrarily applied a *new rule* to the WOHRLE variance request – if you build improvements without a permit in a setback area, you can not get a variance to cure your mistake until after you remove the improvements. This rule is not found in Idaho Code or the Kootenai County Zoning Ordinance and it was arbitrary, capricious and an abuse of discretion for the Board of Commissioners to apply such a rule to the WOHRLE variance request. [6]

Finally, there is no evidence in the record to support the Board's third conclusion of law, that the "variance is not necessary to accommodate the recreational use of the property and would be detrimental to surrounding properties and the public welfare if zero setbacks and lake encroachments were to be allowed, even by special permit." [A.R. p. 178, ¶ 5.03] On the

[6] It should not be overlooked that the same Commissioners approved a variance for the Iacoboni staircase, built in a setback area without a building permit, three weeks after they denied the Wohrle variance.

contrary, all the evidence demonstrated that the requested variance was **essential** to have reasonable use of the land and was **not** in conflict with the public interest.

Perhaps the best evidence to support the necessity of the decks is the photos showing the topography of the property at the only point of access - the shoreline. In order to have any use of their land, WOHRLE must either rappel from a helicopter, or step off their dock onto a safe, relative flat surface. There is no *natural* area along the shoreline of the WOHRLE parcel that would allow safe and reasonable use of the land. To access and use the remainder of the WOHRLE parcel would require risk to life and limb. During the Commissioners' hearing, Ted Baycroft testified in favor of the WOHRLE variance:

> The only place they had to do what they did is where they did it. There was, I mean, it's, it's a case of undue hardship. There was absolutely nowhere else in the process of doing that building where they could have done anything.

[Board Tr. p. 15, lines 17-20]

The decks were placed so that they would not be submerged during high water levels and would be reasonably accessible during low water seasons. [7] Again, all of the evidence supported a finding that the decks were necessary to make reasonable use of the land, and there was no evidence or testimony that a lesser variance would allow reasonable use of the land. Nevertheless, on this issue only, the district court remanded the matter back to the County for further hearing.

With respect to the Board's conclusion that the variance would be detrimental to surrounding properties and the public welfare, there is absolutely no evidence to support such a

[7] The photos at page 38 of the Agency Record show high and low water levels.

conclusion. There was **no** public opposition to the WOHRLE variance, only support. There was **no** agency opposition and all initial objections of the Army Corps and Department of Lands were resolved. Even the County code violations were resolved through WOHRLE's compliance with County staff requirements. [A.R. p. 176, ¶ 3.01]

Despite all this evidence of **no conflict** with the public interest, the County claims that "substantial and undisputed evidence" supports the County's decision. [Appellant's Brief. p. 13] This *substantial* evidence consists of two items: (1) the decks were built within the setback area without a variance, and (2) the decks were built without building permits. As explained above, neither of these facts supports the County's conclusion that the requested variance was in conflict with the public interest or would confer a special privilege on WOHRLE.

The WOHRLE variance decision should have been made on the facts in the record and according to the legal standards found in I.C. §67-6516 and the County Zoning Ordinance. Instead, Kootenai County arbitrarily and capriciously disregarded the relevant facts in the record and applied a new legal standard that improvements constructed without a permit are inherently contrary to the public interest and automatically disqualified from receiving a variance. The district court correctly held that the County's decision to deny the WOHRLE variance was unsupported by the facts and contrary to Idaho law and the adopted standards in the Zoning Ordinance.[8]

[8] Although not cited by the district court, the Commissioners contradicted every rational for their decision in WOHRLE when they approved the Iacoboni variance three weeks later.

3. The County's decision prejudiced substantial rights of WOHRLE.

This Court recently held that a private property owner has a substantial right to have a land use application evaluated properly and under the correct code. *Lane Ranch Partnership v. City of Sun Valley,* Docket No. 33423, at p. 5 (Idaho 12-27-2007). As argued above, the Kootenai County Commissioners did not properly evaluate the WOHRLE variance request and did not apply the correct legal standards to that request. As in *Lane Ranch*, the decision in this case deprived WOHRLE of the ability to have reasonable access to and use of their land.

In addition, WOHRLE was denied meaningful due process by the manner in which their hearing was conducted by the Board of Commissioners. In *Neighbors for a Healthy Gold Fork v. Valley County,* Docket No. 33552, (2007 Opinion No. 140) this Court stated:

> Procedural due process requires some process to ensure that the individual is not arbitrarily deprived of his or her rights in violation of the state or federal constitutions. *Cowan*, 143 Idaho at 512, 148 P.3d at 1258. This requirement is met when the defendant is provided with notice and an opportunity to be heard. *Id.* The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy the due process requirement.

Id. at 6.

When a governing body sits in a quasi-judicial capacity, it must confine its decision to the record produced at the public hearing. Failing to do so is a violation of procedural due process of law. *Chambers v. Kootenai County Board of Commissioners,* 125 Idaho 115, 118 (1994); *Cooper v. Board of County Commissioners of Ada County,* 101 Idaho 407, 411 (1980); *Gay v. Board of County Commissioners of Bonneville County,* 103 Idaho 626, 629 (Ct.App. 1982).

This Court has also observed that when a governing body deviates from the public record, it essentially conducts a second fact-gathering session without proper notice in violation of due process. *Chambers*, 125 Idaho at 118.

In this case, the transcript of the Commissioners' hearing shows clear violations of the WOHRLE's due process rights. After closing the public hearing, the Commissioners went on a fact-finding mission to explore whether the WOHRLE property was "buildable or non-buildable". The Commissioners apparently believed this question was critical to their decision despite the fact that whether land is assessed as "buildable" or "non-buildable" is not relevant under Idaho Code §67-6516 or the Kootenai County zoning ordinance. The record shows that the Commissioners sent a staff person to gather new evidence from the Assessor's office despite the fact that the issue had not been discussed by staff or raised during the Hearing Examiner's hearing. WOHRLE had no notice that this issue was going to be raised by the governing body.

After the Commissioners reviewed and commented on the new evidence collected from the Assessor's office, the hearing was reopened to allow WOHRLE to respond. It is obvious from the transcript that Mr. Wohrle did not expect to be ambushed with the Assessor's records or even understand the point Commissioner Johnson was attempting to make. Commissioner Johnson handed the Assessor's record to Mr. Wohrle and said:

> Commissioner Johnson: This is what we received from the Assessors' Office on your property and we want to allow you any comments you'd like to add.

[Board Tr. p. 42, L. 14-16]

In response, Mr. Wohrle asked a reasonable question:

James Wohrle: Non-buildable, does that mean any structure, such as a deck, or does that just mean house, or living structure?

[Board Tr. p. 42, lines 17-19]

The comments that followed from Commissioner Johnson did little to answer Mr. Wohrle's question and contained numerous misstatements of fact, opinions and legal theories upon which the Commissioners apparently relied in making their decision to deny the variance. For example, Commissioner Johnson testified that the WOHRLE property is "taxed at a non-buildable rate", that "it is a buyer-beware state", that "you purchased a piece of property that was at a value that would be much less, knowing it was a dock lot", and "[h]istory provides us with the properties on that lake, on that side of the lake, they are non-accessble. Everybody knew it for years and years and years." [Board Tr. p. 43, L. 3-9] There is no basis for this factual testimony by Commissioner Johnson and Mr. Wohrle certainly did not have a *meaningful* opportunity to rebut the testimony.

The Commissioners did not confine their decision to the evidence presented by the witnesses, but instead conducted their own fact gathering session and offered their own testimony in violation of the WOHRLE's due process rights. It appears that Commissioner Johnson assumed the role of opponent to the WOHRLE variance application. Although Mr. Wohrle was given a token opportunity to respond to the evidence presented by Commissioner Johnson, none of the other people present at the hearing were even offered a chance to speak before the hearing was again closed on a motion by Commissioner Currie that was unanimously approved without hesitation or discussion. [Board Tr. p. 44, L. 11-22]

When the governing body in a land use matter ignores the facts, applies the wrong legal standards and becomes an adversary witness, can there be any doubt that substantial rights of the applicants were prejudiced?

4. The district court did not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.

The district court did not disagree with or change any of the findings of fact by the Board of Commissioners. As a matter of fact, all of the Board's findings of fact listed in Section II of their Order of Decision are correct. [A.R. p. 175-176] The district court disagreed with the Board's conclusions of law. I.C. §67-5279(3) states, "the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decision are:

(a) ...
(d) not supported by substantial evidence on the record as a whole; or
(e) arbitrary, capricious, or an abuse of discretion."

There is no indication that the district court engaged in any weighing of the evidence on questions of fact. There was essentially no dispute between the parties regarding the underlying facts of this case. Instead, the district court held that the County's *conclusions* were not supported by the uncontested factual record.

As argued above, there are no facts in the record to support the Board's conclusion that the variance was in conflict with the public interest where there was no public opposition, no agency opposition and no County staff opposition. There are no facts in the record to support the Board's conclusion that the variance was not the necessary for the reasonable use of the land.

The photographic evidence and uncontested testimony clearly showed the absolute need for the setback variance requested by WOHRLE. And there are no facts in the record to support the Board's conclusion that the variance would confer a special privilege on WOHRLE not enjoyed by others. The zero-setback requested by WOHRLE is not prohibited under Idaho Code or the County Zoning Ordinance, and others who build without building permits are given the opportunity to correct their mistake without being forced to tear down the construction. It was the absence of supporting evidence that lead the district court to hold the County's decision was arbitrary, capricious and an abuse of discretion.

The evidence in the record clearly supported the County's conclusion that WOHRLE would suffer an undue hardship from a literal enforcement of the 25 foot setback requirement. The evidence in the record as a whole also supported a conclusion that the requested variance was **not** in conflict with the public interest. For these reasons, the district court ordered the County to grant the variance, but remanded the matter back to the Board to determine the extent of the variance to be granted.

5. It was not error for the district court to remand the matter back to the Board for a determination of the extent of the variance to be granted.

Having determined that the WOHRLE variance should be granted, the court correctly declined to weigh the evidence on the factual question of whether the requested variance was the minimum necessary to allow a reasonable use of the land. Kootenai County Zoning Ordinance Section 30.03(c)(3) requires a finding, "[t]hat the variance is the minimum variance that will make possible the reasonable use of the land, building, or structure."

Although the only evidence and testimony received by the Hearing Examiner and County Commissioners was that WOHRLE could not use the property at all without creating a level place to sit or stand, the district court understood that this factual finding could only be made by the Board of Commissioners. The district court correctly remanded the matter back to the Board for that factual determination.

6. The decision of the Board of Commissioners was made upon unlawful procedure.

As an additional issue on appeal, WOHRLE claims that the County's decision was made upon unlawful procedure; specifically the violations of WOHRLE's procedural due process rights detailed in Section III, Part 3 above.

7. The decision of the Board of Commissioners was not supported by substantial evidence in the record.

As an additional issue on appeal, WOHRLE also claims that the decision of the Board of Commissioners was not supported by substantial evidence in the record. Although the district court found that the County's decision to deny the variance request was not supported by any evidence whatsoever, the court held that the decision was arbitrary, capricious and an abuse of discretion. For the reasons argued in Section III, Part 2 above, WOHRLE also claims that the district court correctly overturned the Board of Commissioners pursuant to Idaho Code §67-5279(3)(d).

8. The district court properly awarded attorney fees and costs to WOHRLE, and WOHRLE is entitled to fees and costs on appeal pursuant to Idaho Code 12-117.

Idaho Code §12-117 allows an award of reasonable attorney's fees and reasonable expenses to the prevailing party, "if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law."

This Court interpreted Section 12-117 in *Bogner v. State Department of Revenue and Taxation,* 107 Idaho 854, 693 P.2d 1056 (1984):

> We believe the purpose of that statute is two-fold: (1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never had made. *Accord Van Gordon v. Oregon State Board of Dental Examiners*, 63 Or.App. 561, 666 P.2d 276, 280 (1983).

Id. 107 Idaho at 859.

In *Rural Kootenai Organization v. Board of Commissioners*, 133 Idaho 833, 993 P.2d 596 (1999) the Kootenai County Board of Commissioners approved a preliminary subdivision plat after concluding that the proposal complied with the applicable ordinance requirements. After finding that the proposal did not comply with the ordinance requirements for open space and proof of ownership, this Court held that the Board had acted without a reasonable basis in fact and approved an award of attorney fees against Kootenai County under §12-117. *Id.* 133 Idaho at 845, 846.

Finally, in *Sanders Orchard v. Gem County,* 137 Idaho 695, 52 P.3d 840 (2002) this Court upheld the district court's award of attorney fees to Sanders Orchard pursuant to §12-117.

On a petition for judicial review of the decision by the Gem County Board of Commissioners to deny a subdivision application by Sanders Orchard, the district court determined that the Board had exceeded its statutory authority and that the Board's findings of fact and conclusions of law were not supported by substantial evidence in the record. Gem County appealed the district court decision and this Court affirmed the award of fees to Sanders Orchard pursuant to §12-117 as follows:

> In this case, the Board's decision hinged upon its finding that "it is projected that development of central sewer system and water lines will be extended to that area in the reasonably near future." The Board has not pointed to any evidence it considered that would support that finding. Therefore, by basing its decision upon this finding, the Board acted without a reasonable basis in fact. The district court's award of attorney fees to Sanders Orchard is affirmed.

Id. 137 Idaho at 703.

In the present case, Kootenai County acted without a reasonable basis in fact or law when it denied the WOHRLE variance request. It appears that the Commissioners in this case were upset by the fact that WOHRLE built the decks without first obtaining building permits, and that irrelevant fact distracted the Commissioners from making their decision based on the relevant facts and the proper law. Without any evidence to support their decision, the Commissioners concluded that the requested variance would conflict with the public interest. Because the County acted without a reasonable basis in fact or law, it was proper for the district court to award fees and costs to WOHRLE under I.C. §12-117. An independent review of the record before the district court should lead this Court to the same conclusion.

The County argues that it was inappropriate for the district court to award fees under section 12-117 because the County was interpreting and applying Idaho Code and its Zoning Ordinance to improvements constructed without a building permit. The County argues that, under these circumstances, the County's decision was reasonable given the lack of any Idaho case law for guidance. The County concludes: "Therefore, even though the District Court decided that the Board's decision was based on an erroneous interpretation of applicable law, an award of attorney fees under Idaho Code §12-117 would be inappropriate even if this Court were to affirm the decision of the District Court because the Board's decision had a reasonable basis in fact and existing statutes, case law, and county ordinances, and because this action involved the interpretation of very broad statute and county ordinance language in a context which has not been definitively addressed by Idaho's appellate courts." [Appellant's Brief, p. 23]

Of course, the district court did not hold that the County's decision was based on an "erroneous interpretation of applicable law." The district court quite clearly overturned the County's decision because it was not supported by substantial facts in the record. The facts of this case do not present an issue of first impression, and Idaho Code §67-6516 is neither ambiguous nor lacking in appellate interpretation. The Board of Commissioners did not struggle to apply the facts of this case to "very broad statute and county ordinance language." They simply ignored the record and their own findings of fact, and reached conclusions without any factual basis or support in the record.

Finally, WOHRLE seeks an award of attorney fees and expenses on appeal under Idaho Appellate Rule 41, and pursuant to I.C. §12-117 and §12-121. Kootenai County has pursued this appeal without legal or factual foundation.

IV. CONCLUSION

This case is not factually or legally complicated. The record shows that WOHRLE's variance request satisfied both elements of Idaho Code §67-6516 and all the standards of the Kootenai County Zoning Ordinance. Unfortunately, the Board of Commissioners focused their attention on the legally irrelevant fact that WOHRLE built the decks without first obtaining a building permit. Because of this distraction, the County concluded that the variance was in conflict with the public interest even though there was no factual evidence in the record to support such a conclusion. The district court reviewed the agency record and correctly determined that the County had no factual basis to deny the variance request. The district court properly remanded the matter back to the County for a determination of the extent of the variance that would allow reasonable use of the land. Because the County acted without a reasonable basis in fact or law, the district court awarded fees and costs under I.C. §12-117.

Accordingly, WOHRLE requests that this Court affirm the district court's ruling and award fees and costs to WOHRLE on appeal.

Respectfully submitted this 11 day of February, 2008.

BECK & POORMAN, LLC

Scott L. Poorman, Attorney for Respondents

Certificate of Service

I hereby certify that on the 11th day of February, 2008, I mailed an original and six (6) bound copies plus one (1) unbound copy of the foregoing **Respondents' Brief** by U.S. mail, postage prepaid, to the Clerk of the Idaho Supreme Court in compliance with I.A.R. 34. I further certify that I served (2) true and correct copies of the foregoing **Respondents' Brief** U.S. mail, postage prepaid, addressed to:

Patrick M. Braden
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Coeur d'Alene, ID 83816

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